Sanjung Selamat Sdn Bhd v CL Chin & Associates (Part 1)

HIGH COURT (KUALA LUMPUR) — CIVIL NO D4–22–67 OF 2005
ABDUL WAHAB PATAIL J
24 MAY 2005

Companies & Corporations — Directors — Authority — Directors supposedly authorized and who signed the resolution had been rejected by the registrar of companies as directors — Whether they were persons actually occupying the position of director — Whether the position takes precedence over the administrative refusal of the registrar of companies to register them as directors — Companies Act 1965 s 4

Enclosure 25 is the defendant CL Chin & Associates application to challenge to plaintiff solicitors to act for the plaintiff on the grounds the two directors who supposedly authorized and signed the resolution authorizing Lim & Hoh have been rejected by the registrar of companies as directors. Enclosure 17 is intended intervenes application. The plaintiff objected to the application on the grounds only commercial rights are involved, not legal rights. There were no sales and purchase agreement with interveners, and their right is only under a deed of guarantee — where deal or arrangement and power of attorney were given only as security. The plaintiff submitted their only right was to sue the plaintiff for money.

Held, dismissing the application with costs:

(1) Enclosure 17 is allowed for the reason that it is unsafe to reject the application at this stage unless the issue of those rights of the proposed intervener is looked into. That could without inconvenience be disposed off more safely together with the plaintiff's application. Since it is apparent that the proposed intervener has some interest, there can be no objection to the proposed intervener being heard in the plaintiff's application (see para 5).

(2) Section 4 of the Companies Act 1965 with considerable foresight set out that the term director 'includes any person occupying the position of a director' for the reason that a company cannot have no director. In this case the previous directors are said to have all resigned. The persons actually occupying the position of director carry the responsibilities including the fiduciary duties of a *de jure* or undisputed director, and must account to the company. These duties and responsibilities as *de facto* directors occupying the position of a director must take precedence over the administrative refusal of the registrar of companies to register them as directors. The function of registration is for public notification and does not affect their appointment as directors, the authority of which emanates from the shareholder's resolutions. This conclusion is consistent with s 107 of the Companies Act 1965 that the directors remain valid notwithstanding any subsequent finding that they are

not valid directors. The nature of the applications in this case are prima facie in the interest of the plaintiff company. There is nothing shown at this point that those orders are to the detriment of the plaintiff company. For these reasons the application at encl 25 was dismissed with costs (see para 9).

[Bahasa Malaysia summary

Kandungan 25 ialah permohonan defendan CL Chin & Associates mencabar peguamcara plaintif bertindak untuk plaintif atas alasan bahawa dua pengarah yang dikatakan diberikuasa dan menandatangani resolusi memberikuasa Lim & Hoh telah ditolak oleh pendaftar syarikat sebagai pengarah-pengarah. Kandungan 17 adalah permohonan bakal pencelah. Plaintif membantah permohonan tersebut atas alasan bahawa hanya hak komersial yang dipertikaikan, bukannya hak perundangan. Tiada perjanjian jual beli dengan pencelah, dan hak mereka hanya di bawah surat ikatan jaminan — di mana perjanjian atau penyusunan dan suratkuasa wakil hanya diberikan sebagai jaminan. Plaintif menghujahkan bahawa hak mereka ialah hanya menyaman plaintif untuk wang.

Diputuskan, menolak permohonan dengan kos:

(1) Kandungan 17 dibenarkan atas alasan adalah tidak selamat untuk menolak permohonan tersebut pada peringkat ini kecuali isu hak-hak pencelah tersebut dapat dipastikan. Ia boleh tanpa kesukaran diselesaikan dengan lebih selamat bersama dengan permohonan plaintif. Oleh kerana ia adalah jelas bahawa bakal pencelah mempunyai kepentingan, sepatutnya tiada bantahan bahawa permohonan bakal pencelah didengar bersama dengan permohonan plaintif (lihat perenggan 5).

(2) Seksyen 4 Akta Syarikat 1965 menyatakan perkataan pengarah sebagai 'includes any person occupying the position of a director' atas sebab sesebuah syarikat tidak boleh tidak mempunyai pengarah. Dalam kes ini, pengarah-pengarah yang terdahulu telah kesemuanya dikatakan meletak jawatan. Orang-orang yang sebenarnya melibatkan dengan kedudukan pengarah memikul tanggungjawab termasuk kewajipan fidusiari seseorang *de jure* atau pengarah yang tidak dipertikaikan, dan mesti bertanggungjawab kepada syarikat tersebut. Kewajipan dan tanggungjawab sebagai pengarah-pengarah *de facto* yang melibatkan dengan kedudukan pengarah harus diambil sebagai pendahuluan mengatasi sebarang penolakan pentadbiran syarikat pendaftar mendaftarkan mereka sebagai pengarah-pengarah. Fungsi pendaftaran adalah untuk laporan awam dan tidak menjejaskan perlantikan mereka sebagai pengarah-pengarah, dimana kuasa untuk melantik berpunca daripada resolusi pemegang-pemegang saham. Kesimpulan sebegini adalah bersesuaian dengan s 107 Akta Syarikat 1965 bahawa pengarah-pengarah terus sah walaupun terdapat carian selepas itu bahawa mereka bukanlah pengarah-pengarah yang sah. Sifat permohonan di dalam kes ini adalah prima facie atas kepentingan syarikat plaintif. Pada masa ini, tiada

apa-apa yang menunjukkan bahawa perintah-perintah tersebut menyebabkan kerugian terhadap syarikat plaintif. Atas alasan ini kandungan 25 ditolak dengan kos (lihat perenggan 9).]

Notes

For cases on authority of the directors, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 148–158.

Legislation referred to

Companies Act 1965 ss 4, 107

David Hoh (Lim & Hoh) for the plaintiff.
Alex De Silva (De Silva & Co) for the defendant.
James E Pushparatnam (Colin Victor George with him) (James Edwin & Co) for the intervener.

Abdul Wahab Patail J:

GROUNDS OF JUDGMENT (ENCL 25)

[1] Enclosure 25 is the defendant CL Chin & Associates application heard on 24 May 2005 for orders:

(a) bahawa Tetuan Lim & Hoh dihalang daripada mewakili plaintif sama ada dalam kamar atau di mahkamah terbuka dan/atau dalam apa-apa keadaan berkenaan dengan tindakan dan perkara ini;

(b) bahawa Tetuan Lim & Hoh tidak boleh kekal atas rekod sebahagian peguamcara bagi pihak plaintif di dalam tindakan ini;

(c) bahawa notis perlantikan peguamcara bertarikh 17 May 2005 yang difailkan oleh Tetuan Lim & Hoh bagi pihak plaintif dibatalkan;

(d) bahawa writ saman dan pernyataan tuntutan yang kedua-duanya bertarikh 14 January 2005 yang difailkan oleh Tetuan Lee & Lim bagi pihak plaintif dibatalkan;

(e) kos permohonan ditanggung oleh plaintif; dan

(f) lain-lain relif dan/atau perintah yang mahkamah yang mulia ini fikirkan patut dan sesuai.

ENCLOSURE 7

[2] At the hearing on 24 May 2005, Mr Alex de Silva for the defendant CL Chin & Associates applied to withdraw encl 7 with costs in the cause, being the defendant's application to disqualify former solicitors of the plaintiff. Mr David Hoh for the plaintiff having no objections, encl 7 was struck off.

[3] Enclosure 17 is intended intervenes application. Mr James Pushparatnam and Mr Collin Victor George appeared for them. Mr David Hoh objected to the

application on the grounds only commercial rights are involved, not legal rights. There were no sales and purchase agreement with intervenes, and their right is only under a deed of guarantee — where deal or arrangement and Power of Attorney were given only as security. He submitted their only right was to sue the plaintiff for money.

[4] Mr James Pushparatnam submitted the distinction between commercial and legal interest had been said in *Peaana Mining* to being not a good way to describe, and the issue is whether the party's right is affected.

[5] The application was allowed for the reason that it is unsafe to reject the application at this stage unless the issue of those rights of the proposed intervener is looked into. That could without inconvenience be disposed off more safely together with the plaintiff's application. Since it is apparent that the proposed intervener has some interest, there can be no objection to the proposed intervener being heard in the plaintiff's application.

[6] The court, therefore, allowed the proposed intervenes' application at encl 17, with costs in the cause.

ENCLOSURE 25

[7] Enclosure 25 is the defendant CL Chin & Associates application to challenge to plaintiff solicitors to act for the plaintiff on the grounds the two directors who supposedly authorized and signed the resolution authorizing Lim & Hoh have been rejected by the Registrar of Companies as directors. It was submitted the very fact the registration was rejected clearly meant the two purported directors who signed the resolution do not have the power to do so, and there was litigation pending on the issue.

[8] Mr David Hoh submitted the issue was whether to prefer the Registrar of Companies' letter over the Register of Directors.

[9] Section 4 of the Companies Act 1965 with considerable foresight set out that the term director 'includes any person occupying the position of a director' for the reason that a company cannot have no director. In this case the previous directors are said to have all resigned. The persons actually occupying the position of director carry the responsibilities including the fiduciary duties of a de jure or undisputed director, and must account to the company. These duties and responsibilities as de facto directors occupying the position of a director must take precedence over the administrative refusal of the Registrar of Companies to register them as directors. The function of registration is for public notification and does not affect their appointment as directors, the authority of which emanates from the shareholder's resolutions. This conclusion is consistent with s 107 of the Companies Act 1965 that the directors remain valid notwithstanding any subsequent finding that they are not valid directors.

A **[10]** The nature of the applications in this case are prima facie in the interest of the plaintiff company. There is nothing shown at this point that those orders are to the detriment of the plaintiff company.

[11] For these reasons, the application at encl 25 was dismissed with costs.

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Application dismissed with costs.

Reported by Sally Kee

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